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Taming the Beast: How the International Legal Regime Creates and Contains Flags of Convenience

Eric Powell

TAMING THE BEAST: HOW THE INTERNATIONAL LEGAL REGIME CREATES AND CONTAINS FLAGS OF CONVENIENCE

ERIC POWELL*

I. INTRODUCTION

Centuries-old maritime jurisprudence continues to guide the law of the sea today. These baseline understandings are necessary to maintain order of the largest international commons, the sea.[1] The seas' central role in globalization, though, strains some of this established law. In particular, the question of jurisdiction has become increasingly complex as ships regularly ply every ocean and visit ports in dozens of countries. Many of these ships are actually subject to the exclusive jurisdiction of States with which they have no connection and which have limited incentives to regulate. This paper explores how this jurisdictional *non sequitur* arose, and when international law permits concurrent jurisdiction. Specifically, this paper emphasizes when U.S. courts can reach activities on the seas.

The seas are both the lynchpin of global trade and the site of global disasters. Nearly 105,000 ships[2] transport more than 90% of world

* Eric Powell served eight years in the Navy's active and reserve Information Dominance Corps. He wrote this paper in partial fulfillment of his J.D. It was awarded Harvard Law School's Addison-Brown Prize for writing on maritime and private international law. He is a graduate of Harvard Law School and Harvard College.

1. 71% of the Earth is covered by water. Aquatic Commons, *Distribution of the Earth's Water*, http://aquaticcommons.org/650/1/Poster13E.pdf (last visited March 16, 2013).

2. United Nations Conference on Trade and Development, *Review of Maritime Transport*, at 36-37, UNCTAD/RMT/2011 (Nov. 22, 2011) [hereinafter RMT].

trade,[3] including oil, chemicals, consumer durables and non-durables, food, and people.[4] Consider, though, recent reminders that the seas are more than globalization superhighways. The quest for new sources of oil tragically resulted in the 2010 Deepwater Horizon spill, which released five million barrels of crude oil into the Gulf of Mexico.[5] Less than eighteen months later, the grounding of the New Zealand-bound container ship *Rena* dumped oil into the sea and onto the shores, harming regional wildlife.[6] In January 2012, a cruise liner dramatically sunk off the coast of Italy, killing at least twenty-one passengers.[7]

Tragedies on the maritime commons present unique considerations.[8] On ships, there is a preliminary question of what authority *can* set and enforce standards on these floating islands. Then, the question of what authority *should* have jurisdiction arises. The list of potential candidates is long: should it follow the ship owner's nationality, the crew's nationality,[9] the incident site, or any of a host of other factors? Further complicating the analysis is the possibility that multiple authorities *should* exercise jurisdiction.

For at least four reasons, States, for their part, are invested in regulating seas, even those far from their coastline. First, tragedies can strike in any country's backyard. Second, even local mishaps such as pollution can have consequences far from the site. Third, every State has an interest in maintaining the utility of the sea. Fourth, States are interested in regulating and protecting their nationals around the world. However, a

3. United Nations International Maritime Organization [IMO], *International Shipping Facts and Figures*, 7 (2011), http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/Statisticalresources/Documents/December%202011%20update%20to%20July%202011%20version%20of%20International%20Shipping%20Facts%20and%20Figures.pdf.

4. RMT, *supra* note 2, at 36-37.

5. *See* articles listed at *Gulf of Mexico Oil Spill*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/o/oil_spills/gulf_of_mexico_2010/index.html (last visited March 16, 2013).

6. *Oil Spill Disaster New Zealand's 'Worst in Decades'*, BBC (Oct. 11, 2011), http://www.bbc.co.uk/news/world-asia-pacific-15251319.

7. *Italy Extends Probe on Cruise Ship Accident*, REUTERS (Feb. 22, 2012), http://www.reuters.com/article/2012/02/22/italy-ship-investigation-idUSR1E8CQ02620120222.

8. Consider, for example, the different risk preferences in the United States and China. American factory safety standards are more stringent than China's. As one observer noted after a recent fatal Chinese factory fire, "[W]hat's morally repugnant in one country is accepted business practices in another . . . ." Charles Duhigg and David Barboza, *In China, Human Costs are Built Into an iPad*, N.Y. TIMES (Jan. 25, 2012), http://www.nytimes.com/2012/01/26/business/ieconomy-apples-ipad-and-the-human-costs-for-workers-in-china.html?pagewanted=all.

9. Ships' crews are representative of the global nature of the business: more than 1.5 million seafarers of nearly every nationality operate ships. IMO, *International Shipping Facts and Figures – Information Resources on Trade, Safety, Security, Environment*, at 9 (March 6, 2012), http://www.imo.org/KnowledgeCentre/ShipsAndShippingFactsAndFigures/TheRoleandImportanceofInternationalShipping/Documents/International%20Shipping%20-%20Facts%20and%20Figures.pdf.

system in which States project unrestrained regulatory power far from their coastlines would be untenable for at least two reasons.[10] First, this unrestrained regulatory power may result in commerce-crippling conflicting jurisdiction. United States Supreme Court Justice Jackson presciently emphasized this insight when he wrote:

> [T]he virtue and utility of sea-borne commerce lies in its frequent and important contacts with more than one country. If, to serve some immediate interest, the courts of each were to exploit every such contact to the limit of its power, it is not difficult to see that a multiplicity of conflicting and overlapping burdens would blight international carriage by sea.[11]

Second, extraterritorial regulation raises a national sovereignty concern. As Chief Justice Marshall famously penned in the seminal United States Supreme Court case on the matter, "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute."[12] Therefore, a sovereign rightfully claims that foreign powers lack jurisdiction within its land borders. A sovereign would similarly object to foreigners reaching for jurisdiction over its local seas or vessels over which it accepted sovereignty.

The limits on regulating the maritime commons inherent in a Westphalian system of nation-States has long been resolved by assigning regulatory, criminal, and civil jurisdiction to a vessel's State of Registration.[13] In other words, the laws of the nation that charter the vessel – which corresponds to the flag the ship flies – govern most aspects of the ship's operations as well as personal conduct onboard. This compromise is referred to as the "law of the flag."

In order for the law of the flag to satisfy States' collective maritime interests, registering States must promulgate and enforce legal regimes

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10. This is a long-standing conundrum of conflict of law. The United States considered its implications for State-exercised personal jurisdiction in *Pennoyer v. Neff*, 95 U.S. 714, 722 (1877)

> And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.

11. *Lauritzen v. Larsen*, 345 U.S. 571, 581 (1953).

12. *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 136 (1812). This was the Supreme Court's first case concerning the United States Federal Courts' jurisdiction over a claim against a friendly foreign military vessel visiting an American port. Interpreting customary international law, the Court concluded that there was no jurisdiction.

13. BOLESLAW ADAM BOCZEK, FLAGS OF CONVENIENCE: AN INTERNATIONAL LEGAL STUDY 158 n.5 (Harvard University Press, 1962) (identifying a number of authoritative sources for this proposition and asserting that "[t]his has been confirmed by practically all writers.").

that protect sister States' reasonable interests. That requirement leads to two simple questions. First, what sorts of States are less likely to create or enforce such a regime? Second, how can sister States legally protect their interests when the registering State fails to do so?

One set of States that might neglect to create or enforce a maritime legal regime are those willing to register, or to "flag" ships with which they have minimal or no connection. Perhaps the ship's owner, operator, captain, and crew are from a different State. Or maybe the ship's operations are unconnected with the flag State: for example, the ship may never dock there or carry cargo relevant to the flag State. In an extreme case, the flagging State may be landlocked. In short, the flag is a "flag of convenience" (FOC), and the flagging State's incentives to maintain a minimally acceptable legal regime is open to question.

Today, FOC vessels account for a disproportionate amount of shipping vessels.[14] With State-vessel ties as flimsy as a few sheets of paper, it is conceivable that these States lack the interest and capacity to regulate all vessels carrying their flag. That developing countries, with troubles more pressing than maritime regulation, predominate the FOC registries[15] exacerbates this concern. Consequently, the international community faces the possibility that its growth relies on an industry that operates in a regulatory vacuum despite its potential to harm any nation.

This paper aims to better understand the circumstances in which a flag State's exclusive jurisdiction can be challenged. The next three parts explain the legal regime from which flags of convenience emerged: Part II describes the freedom of navigation, Part III explains the historical law of the flag, and Part IV reviews the vessel registration process and the sovereign's right to establish domestic flagging standards. Part V draws on these fundamental principles to explain the emergence of FOCs. Part VI explores the theoretical and experiential concerns FOCs raise. Part VII examines the various jurisdictional bases of international law. In Part VIII, these international law jurisdictional hooks are relied upon to evaluate what the international community can and has done in response to FOCs. Part IX concludes.

II. BASIC LAW OF THE SEA: FREEDOM OF NAVIGATION

This section introduces the historical basis and present-day codification of the freedom of navigation. The freedom of navigation is one of the

14. *See FOC Countries, infra* note 96, andaccompanying text.
15. *See* RMT, *supra* note 2, at 44.

most fundamental and widely recognized maritime principles.[16] Today, the United Nations Convention on the Law of the Sea (UNCLOS)[17] provides freedom of the high seas, which includes the freedom to navigate the high seas without interference, to both coastal and land-locked States.[18] UNCLOS echoes the United Nation's 1958 Convention on the High Seas (1958 Convention).[19]

UNCLOS[20] divides the sea into the zones illustrated in the image below: principally the territorial sea extends twelve nautical miles[21] from the coast,[22] the contiguous zone occupies the subsequent twelve nautical miles,[23]and the exclusive economic zone reaches to 200 nautical miles[24] after which lies the high seas.[25] As explored in more detail below, the coastal State enjoys increasing power to regulate ship passage and activities closer to its shores.[26] A coastal State's ability to exercise jurisdiction is at its nadir on the high seas, which is "open to all States" 200 miles from the coast.[27]

16. BOCZEK, *supra* note 13, at 2.

17. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS]. UNCLOS is recognized as the "international constitution of the oceans" although the U.S. has not signed it. Keith S. Gibel, *Defined by the Law of the Sea: "High Seas" in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAVAL L. REV. 54 (2007) (quoting Canada's Ocean Strategy, Our Oceans, Our Future, Fisheries and Oceans Canada, 5 (2002), http://www.dfo-mpo.gc.ca/oceans/publications/cos-soc/pdf/cos-soc-eng.pdf).

18. *Id.* at Art. 87. UNCLOS also recognizes freedom of the high seas to include overflight, submarine cable installation, artificial island construction, fishing and other rights.

19. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 [hereinafter 1958 Convention].

20. The U.S. has incorporated many of the UNCLOS provisions into domestic law. RESTATEMENT (THIRD) ON FOREIGN RELATIONS LAW OF THE UNITED STATES Introductory Note to Part V (1987) [hereinafter RESTATEMENT].

21. A nautical mile is approximately 1.15 miles.

22. UNCLOS, *supra* note 17, at Art. 3.

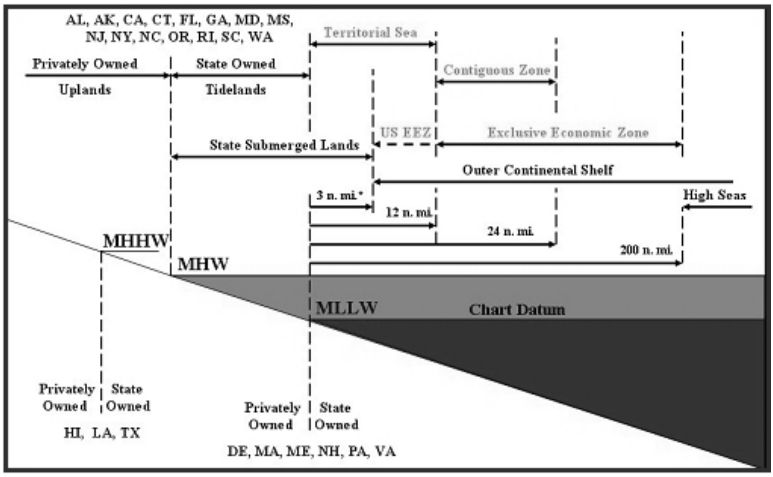
23. *Id*. at Art. 33.

24. *Id.* at Art. 57.

25. *Id.* at Art. 86.

26. *See infra* notes 273-280 and accompanying text.

27. UNCLOS, *supra* note 17, at Art. 87.



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Jurists have recognized universal ownership and freedom of the high seas for centuries. Valin, the author of an influential eighteenth century commentary on maritime law, explained, "[f]or in short the ocean belongs to no one, and the conclusion undoubtedly to be drawn from this is that all nations are permitted to navigate it."[29] Azuni, an eighteenth century Italian publicist, grounded this freedom on the seas' economic importance as "great highways traced by nature between the different parts of the world," when he wrote, "all have the same equal rights to [the seas'] use as the air they breathe, and to the sun that warms them."[30] Their Swiss contemporary, Vattel, also concluded that no single State can regulate the seas.[31] He relied on the observation that one may "sail and fish without the least prejudice to any person whatsoever."[32] Thus, there is a solid backing for the proposition that the high seas are a universal possession.

III. LAW OF THE FLAG

The observation that there is no single sovereign of the high seas (Part II) led to the emergence of "[p]erhaps the most venerable and universal rule of maritime law"[33]: the law of the flag. This part presents the judicial and theoretical underpinnings of this regime. States regulate and exercise

28. National Oceanic and Atmospheric Association Office of the General Counsel, *Maritime Zones and Boundaries*, http://www.gc.noaa.gov/gcil_maritime.html (last visited March 18, 2013).
29. *United States v. Rodgers*, 150 U.S. 249, 281 (1893) (Brown, J., dissenting).
30. *Id.*
31. *Id.* at 272-73 (Gray, J., dissenting).
32. *Id.* at 281 (Brown, J., dissenting).
33. *Lauritzen*, *supra* note 11, 585.

jurisdiction over their registered vessels under the theory of the law of the flag.

In 1927, the Permanent Court of International Justice (P.C.I.J.) affirmed the law of the flag in the *Lotus* case.[34] In *Lotus*, the P.C.I.J. considered whether Turkey could exercise jurisdiction over the French officers of a French ship that fatally collided with a Turkish ship on the high seas. The Court declared, "apart from certain special cases which are defined by international law—vessels on the high seas are subject to no authority except that of the State whose flag they fly."[35] Although the P.C.I.J. subsequently found that this was a special case that warranted concurrent jurisdiction because the French officers affected a Turkish ship,[36] the P.C.I.J.'s reasoning demonstrates the importance of the law of the flag.

The theoretical premise for exclusive flag State jurisdiction arises from the historic concept of vessels as literally part of the flag-country's territory.[37] Based on this understanding, foreign jurisdiction would be a clear infringement on State sovereignty. Although this territorial conception has largely been dismissed,[38] the result that another State may not interfere persists, perhaps because of its simplicity.[39] Today, UNCLOS mandates that "[s]hips shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its *exclusive* jurisdiction on the high seas."[40]

In summary, the law of the flag is the internationally accepted starting point of high seas jurisdiction. As the P.C.I.J. *Lotus* opinion and the UNCLOS provisions acknowledge, there are exceptions to exclusive flag State jurisdiction.[41] Concurrent jurisdiction of FOC ships hinges on those exceptions, which are based on geography, nationality, domestic

34. S.S. Lotus (Fr. v. Turk.)1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

35. *Id*. at 25.

36. *Id.* at 23. This holding was later reversed by the 1958 Convention and UNCLOS, which hold in favor of flag State jurisdiction even in international collisions. *See* 1958 Convention, *supra* note 19, at Art. 11; UNCLOS, *supra* note 17, at Art. 97.

37. *See, e.g., Rodgers*, *supra* note 29, at 264 ("As we have before stated, a vessel is deemed part of the territory of the country to which she belongs."); *see also S.S. Lotus*, *supra* note 34, at 25 ("[W]hat occurs on board a vessel on the high seas must be regarded as if it occurred on the territory of the State whose flag the ship flies.").

38. *See* RESTATEMENT, *supra* note 20, § 402 (rejecting the territory basis of high seas jurisdiction in favor of an independent basis).

39. *See, e.g., Lauritzen*, *supra* note 11, at 585 ("there must be some law on shipboard, that it cannot change at every change of waters, and no experience shows a better rule than that of the State that owns her.").

40. UNCLOS, *supra* note 17, at Art. 92 (emphasis added).

41. *See* William Tetley, *The Law of the Flag, 'Flag Shopping,' and Choice of Law*, 17 TUL. MAR. L. J. 139, 158 (1993).

protection, and universal prohibitions. Before exploring those alternate bases of jurisdiction, the following sections elaborate on how the flagging process gave rise to FOC States and their attendant concerns.

IV. VESSEL REGISTRATION PROCESS

This section examines vessel registration: the administrative process that connects a ship with a State.[42] It discusses vessel owners' legal obligation to register, States' control of domestic registration requirements, diversity in registration requirements, and international recognition of foreign registrations.

The requirement that all ships on the high seas have a registration is demonstrated by court cases denying legal rights to unregistered vessels. In 1982, the Eleventh Circuit considered two such cases in companion.[43] In the lead case, American authorities seized an unregistered vessel on the high seas[44] and arrested its foreign crew on drug possession charges.[45] Unlike previous high-seas seizures, there was no evidence that the vessel was destined for, or had any connection with, the United States.[46] Nonetheless, the court held that international law permits jurisdiction over Stateless vessels[47]: they have no right to freedom of navigation because they are "international pariahs" that pose a threat to the order of the seas.[48]

The Eleventh Circuit cited an influential 1948 English Privy Council opinion, *The "Asya."*[49] In that case, a British destroyer seized the "Asya" freighter on the high seas after designating it Stateless and discovering that it held 733 passengers with plans to sneak illegally into Palestine.[50] In upholding the seizure, the Council quoted Oppenheim's turn of the century international law treatise, "[i]n the interest of order on the open sea, a vessel not sailing under the maritime flag of a State enjoys no protection whatever, for the freedom of navigation on the open sea is

42. BOCZEK, *supra* note 13, at 92; ROBERT RIENOW, THE TEST OF THE NATIONALITY OF A MERCHANT VESSEL 214 (Columbia University Press, 1937) ("About this proposition that vessels are stamped with the nationalities of particular States the whole of the maritime code for the regulation of the use of the high seas has been built.").

43. *United States v. Marino-Garcia*, 679 F.2d 1373 (11th Cir. Fla. 1982). Keep in mind that United States local and district court cases are not binding international law.

44. What makes a vessel Stateless is outside the scope of this paper. In *Marino-Garcia*, the crewmembers asserted a false nationality. *Id.* at 1378 n.3.

45. *Id*. at 1378.

46. *Id.* at 1377 n.1.

47. *Id.* at 1383. Note, however, that there is a circuit split on the matter. *See id*. at 1385.

48. *Id.* at 1382.

49. *Id*. at 1382-83 (citing *NaimMolvanv. Attorney-General for Palestine (The "Asya")* [1948] 1 A.C. 351 (P.C.)).

50. *The "Asya"*, *supra* note 49. *See also* 25 Brit. Y.B. Int'l L. 421-23 (1948).

freedom for such vessels only as sail under the flag of a State."[51] Today, UNCLOS codifies a vessel's obligation to flag in its mandate that, "[s]hips shall sail under the flag of one State only."[52]

States exclusively control their domestic procedures for complying with this international requirement. International law grants registering States nearly unfettered authority to dictate registration requirements,[53] except that the registration (i) cannot infringe another State's rights, (ii) cannot be granted if there is a reasonable suspicion that the vessel will be used to violate international law, (iii) must be for a single nationality, and (iv) must be in accordance with State treaties.[54]

In perhaps the seminal case on this issue, the Permanent Court of Arbitration in the Hague considered Great Britain's objection that France's practice of flagging vessels from the British Muscat protectorate interfered with Muscat's independence.[55] The Court disagreed: it found that only France could restrict French registration rules.[56] The United States has repeatedly guarded this sovereignty. In fact, at the nation's birth, one of Congress's first acts was to outline the United States' vessel registration system.[57] A century later, the Commissioner of Navigation affirmed, "[the United States] judges of the requirements and of the formalities to be observed to give its national character to private trading-vessels."[58] Nearly a century later, the United States Supreme Court perfunctorily re-avowed, "[e]ach State under international law may determine for itself the conditions on which it will grant its nationality to a merchant ship."[59] Today, States' registration

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51. *Id.* (quoting OPPENHEIM'S INTERNATIONAL LAW 546 (H. Lauterpacht ed., 6th ed. vol. 1 1944)).

52. UNCLOS, *supra* note 17, at Art. 92.

53. BOCZEK, *supra* note 13, at 105-06; EmekaDuruigbo, *Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry*, 7 ANN. SURV. INT'L & COMP. L. 101, 109-10(2001) (citing Julie Mertus, *The Nationality of Ships and International Responsibility: The Reflagging of the Kuwaiti Oil Tankers*, 17 DENV. J. INT'L. L. & POL'Y 207 (1988)).

54. BOCZEK, *supra* note 13 at 105-06; Duruigbo, *supra* note 53, at 109-10 (citing Mertus, *supra* note 53, at 207).

55. BOCZEK, *supra* note 13 at 100-01 (citing Muscat Dhows (Fr. v. Gr. Brit.), Hague Ct. Rep. (Scott) 93 (Perm. Ct. Arb. 1905)).

56. *Id*. at 101. The Court subsequently found that France had bound itself in a Franco-British treaty that prohibited this particular flagging.

57. H. Edwin Anderson, III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L. J. 139, 145 (1996) (citing Act of Sept. 1, 1789, ch. 11, 1 Stat. 55 (1789) (referred to as The Registration Act of 1789)).

58. RIENOW, *supra* note 42, at 17 (citing Mr. Fish to Admiral Polo de Bernabe, April 18, 1874, Virginius, 2 For. Rel. (1875-76) 1207-08).

59. *Lauritzen*, *supra*, note 11, at 584.

autonomy is codified in UNCLOS: "Every State shall fix the conditions for the grant of its nationality to ships."[60]

This sovereignty has resulted in significant variety among the more than 150 States that register ships.[61] Importantly, some States permit foreign ship owners to register their vessels. Such an "open registry" contrasts with other States' "closed registries," which require domestic ownership.[62] Registration requirements differ along other axes as well. For example, some States also require a portion of a vessel's officer and crew to be nationals, and some even regulate a ship's place of construction.[63]

States are obliged to respect other States' registration methods.[64] For example, in *The Virginius* Incident in 1873, Spain argued that it permissibly seized a U.S. vessel on the high seas because, in contravention of American registry law, Cubans owned the vessel.[65] President Grant, his Secretary of State, and his Attorney General all responded that Spain must recognize the valid registry papers.[66] They asserted that the United States had exclusive jurisdiction to inquire whether the papers were fraudulently obtained.[67] Spain eventually returned the ship, because it recognized the validity of the ship's registration papers.[68] The Supreme Court later adopted President Grant's position that "a registration can be questioned only by the registering State."[69]

V. FLAGS OF CONVENIENCE

As described in the previous section, the international system grants States great flexibility to set registration terms that other States must recognize; this dynamic created the context for widespread use of Flags of Convenience (FOCs). This section defines FOCs, explores the motives of FOC nations and FOC vessel owners, presents an example of an FOC regime, and estimates the size of the FOC market.

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60. UNCLOS, *supra* note 17, at Art. 91. Again, UNCLOS is only binding on signatory States.
61. RMT, *supra* note 2, at 48.
62. Anderson, *supra* note 57, at 151.
63. *See id*. at 155-56 for descriptions of US, British, Liberian, Panamanian, and Luxembourg registry requirements.
64. BOCZEK, *supra* note 13, at 112.
65. *See* BOCZEK, *supra* note 13, at 112.
66. BOCZEK, *supra* note 13, at 112-13.
67. *Id.*
68. *Id.* at 112. It was too late, though, to save most of the crew and passengers from Spanish execution.
69. *Lauritzen*, *supra* note 11, at 584.

FOC is a slippery and generally pejorative term that describes a registry with certain characteristics and membership motivations.[70] In a widely referenced 1970 British investigation of flags of convenience, the Rochdale Report by the British Committee of Inquiry identified six characteristics FOC registries often exhibit.[71] First, FOCs are open registries: foreigners can own the vessel.[72] Second, the registry is easily accessible, often from a consulate abroad.[73] Third, the registry imposes minimal or no income taxes; revenues are predominately from registry and annual fees.[74] Fourth, apart from the revenues, the level of registration exceeds the flag State's requirements for domestic shipping, such as defense.[75] The associated revenues may substantially impact the country's finances.[76] Fifth, there are no domestic crewing requirements.[77] And sixth, the flag State lacks the power and administration to effectively impose regulations.[78]

In contrast to traditional maritime nations, whose registries are predominately motivated by the merchant marine's role in national defense,[79] FOC countries have predominately pecuniary motivations.[80] Financial motivations are not confined to direct revenues from registries: some countries use FOCs as a loss-leader to attract companies to offshore industries.[81] Some scholars argue that FOC countries additionally seek international influence,[82] though this is at most an ancillary motivation, especially at first.[83]

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70. Anderson, *supra* note 57, at 157.
71. Quoted in Anderson, *supra* note 57, at 157.
72. *Id*.
73. *Id*.
74. *Id*.
75. *Id*.
76. *Id*.
77. *Id*.
78. *Id*. at 158.
79. RIENOW, *supra* note 42, at 5. The merchant marine is critical to military sealift. *See infra* notes 137-39 and accompanying text. In addition, States can convert registered ships into warships or appropriate it for other purposes. RIENOW, *supra* note 42, at 5, 7; *see alsoinfra* notes 133-135 and accompanying text.
80. Duruigbo, *supra* note 53, at 113 (citing Richard Payne, *Flags of Convenience and Oil Pollution: A Threat to National Security*, 3 HOUSTON J. INT'L L. 67, 69 (1980)).
81. ELIZABETH R. DESOMBRE, FLAGGING STANDARDS: GLOBALIZATION AND ENVIRONMENTAL, SAFETY, AND LABOR REGULATIONS AT SEA 213 (The MIT Press, 2006).
82. DESOMBRE, *supra* note 81, at 210; Anderson, *supra* note 57, at 160 n.137.
83. For this proposition, Anderson references Panama and Liberia's leadership roles in the International Maritime Organization. *Supra* note 57, at 160 n.137. It should be recognized that the influence cited, then, is largely confined to the maritime sector itself. Further, it did not arise organically but was begrudgingly accepted by the traditional maritime nations following a court order. *See also* RODNEY CARLISLE, SOVEREIGNTY FOR SALE: THE ORIGINS AND EVOLUTION OF THE PANAMANIAN AND LIBERIAN FLAGS OF CONVENIENCE 156-57 (Naval Institute Press, 1st ed. 1981). The court premised its mandate on the size of the Panamanian and Liberian registries, not simply

For example, consider the Liberian registry in 1996.[84] Administered through a Virginia-based company, it was nearly completely open.[85] Liberia imposed no crew nationality requirements and granted tax subsidies to registered ships.[86] Liberia almost certainly considered the registry a success: it generated 50-75% of the country's annual revenues.[87]

For their part, ship owners seek a comparative advantage. In FOC registries, they can often minimize operating costs by exploiting low tax rates and labor costs.[88] For example, Exxon estimated that it would cost 78% less to operate a 28-man tanker from the Philippines than one from the United States.[89] Low standards in areas such as pollution may also incentivize registrations of convenience, though the evidence is mixed.[90] In addition, the reduced likelihood of wartime conscription and the potential ability to avoid legal ramifications may influence ship owners' registration decisions.[91]

FOCs, with roots stretching at least to Roman times,[92] have increased in importance in the last half-century. After an ignominious role in the slave trade,[93] their modern usage accelerated as post-World War I havens from U.S. efforts to build a strong merchant marine and impose domestic social reforms-like-prohibitions.[94] United States-based shipping

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their existence, which clearly Panama and Liberia could not have anticipated when they began their registries.

84. It is unclear if Liberia's registration requirements have changed since 1996. Regardless, its dated procedures should be considered emblematic of the procedures in more emerging FOC countries today: as Liberia has gained prominence as a flagging country, other countries have assumed Liberia's previous role as a minimum-requirement country. DESOMBRE, *supra* note 81, at 99. For current registry requirements of different vessels, *see* Liberian Registry, *Vessel Registration Procedures*, www.liscr.com (under the "Maritime" tab choose "Vessel Registration Procedures").

85. Anderson, *supra* note 57, at 155. I hedge "nearly" because there was a toothless maximum size restriction for foreign-owned vessels that could be waived or circumvented by creating a paper corporation or partnership in Liberia.

86. *Id*.

87. *Vessel Operations Under Flags of Convenience and Their Implications on National Security Before the Spec. Oversight Panel on the Merchant Marine of the H. Comm. on Armed Services*, 107th Cong. 14 (2002) (Statement of Frank A.Wolf, Rep. of Va.) [hereinafter*Vessel Operations Under FOC*].

88. Duruigbo, *supra* note 53, at 114.

89. *Id.* at 114 (citing L.F.E. Goldie, *Environmental Catastrophes and Flags of Convenience – Does the Present Law Pose Speical Liability Issues?* 3 PACE Y.B. INT'L L. 63, 73 n. 471 (1991)).

90. Duruigbo, *supra* note 53, at 114-15; *see also infra* notes 119-123, 146-49 and accompanying text.

91. Tina Shaughnessy & Ellen Tobin, *Flags of Inconvenience: Freedom and Insecurity on the High Seas*, 5 J. INT'L L. &POL'Y 15 (2006-07).

92. Frank L. Wiswall, Jr., *Flags of Convenience*, *in* UNITED STATES SHIPPING POLICIES AND THE WORLD MARKET 113 (William A. Lovett ed., 1996).

93. CARLISLE, *supra* note 83, at xiii.

94. *Id*. at 3.

companies greatly increased their use of open registries after World War II: ship owners were desperate to replace their war-ravaged merchant fleet without the burdens of the American tax and labor regimes.[95] Today, the International Transport Workers' Federation, a seafarers' trade union association, identifies thirty-two FOC countries.[96] While this list reflects the association's political agenda, that FOC vessels sail the high seas in large numbers is undeniable: countries accounting for 40% of tonnage – Panama, Liberia, and the Marshall Islands – are not among even the top thirty-five States of ownership.[97]

VI. POTENTIAL CONCERNS ARISING FROM FLAGS OF CONVENIENCE

This part addresses theoretical and experiential concerns with FOCs. Critics of the FOC regime include organized labor,[98] environmentalists,[99] security experts,[100] and traditional maritime nations.[101] Section VI.A explains why critics allege that FOC States have low standards and toothless enforcement schemes. Section VI.B amplifies the criticism that FOCs harm national security by depriving the domestic State of maritime surge capacity and by obfuscating ship ownership. Section VI.C presents the objection that FOCs support human rights violators. Section VI.D uses empirical data and incentive-based theories to offer an alternative viewpoint that FOCs are not objectionable and may actually represent a well-functioning market.

A. STANDARDS AND ENFORCEMENT

Critics vocally assert that FOC countries have low standards for ship work and life[102] and fail to enforce even those.[103] These shortcomings affect work conditions, worker safety, the environment and other natural

95. *Id*. at 110.

96. *FOC Countries,* INTERNATIONAL TRANSPORT WORKERS' FEDERATION, http://www.itfglobal.org/flags-convenience/flags-convenien-183.cfm (last visited March 18, 2013).

97. RMT, *supra* note 2, at 47. 40% of ships (by tonnage) are flagged in an FOC State but owned by a person in a non-FOC State.

98. *See e.g.,* International Transport Workers' Federation, *Flags of Convenience Campaign*, http://www.itfglobal.org/flags-convenience/index.cfm ("For 50 years the ITF, through its affiliated seafarers' and dockers' unions, has been waging a vigorous campaign against shipowners who abandon the flag of their own country in search of the cheapest possible crews and the lowest possible training and safety standards for their ships.").

99. *See, e.g.,* Duruigbo, *supra* note 53, at 115-17.

100. *See, e.g., Vessel Operations Under FOC*, *supra* note 87, at 79 (Statement of Paul J. Pluta, Rear Admiral, Assistant Commandant for Marine Safety and Environmental Protection, U.S. Coast Guard, Dep't of Transp.).

101. Anderson, *supra* note 57, at 167. *See also infra* notes 279-92 and accompanying text regarding the "genuine link" campaign.

102. Shaughnessy & Tobin, *supra* note 91, at 18-19, 21.

103. Tetley, *supra* note 41, at 174.

resources (such as fisheries), and safety on the seas. They result from FOC States' incentive structure, FOC States' enforcement capabilities, and FOC vessels' shipboard dynamics.

From a theoretical perspective, critics claim that FOC States do not internalize the costs of low regulation and that this disjoint in expenditures widens the gulf between their and other States' incentives.[104] For example, landlocked States and States with little maritime commerce are not as affected by sea pollution and maritime accidents as coastal States.[105] Consequently, they have little reason to regulate risky maritime behavior.[106] Likewise, a State has no paternalistic incentive to protect its nationals when the ship owner, officer corps, and crew are foreign.[107] Absent the normal costs of a lax regulatory State, nothing offsets FOC States' preexisting pecuniary incentives. Instead, avoiding the expenses of regulating – such as operating a coast guard and administrative structure[108] – and attracting vessels and their associated revenues dominate FOC States' decisions regarding implementation and enforcement of regulations.[109] A 1989 study seemingly confirmed critics' nightmarish predictions: it found that flag States acted on just 17% of foreign referrals for standard violations.[110]

Critics additionally allege that ship owners can escape enforcement in FOC States. First, ship owners in FOC States may be more difficult to identify than in closed registries.[111] Even once identified, owners' ability to hide behind new corporate identities hinders sustained tracking and enforcement.[112] Even if owners and other key personnel are identified and tracked, they may be able to avoid personal jurisdiction by not visiting the flag State.[113] They may also refuse to testify, seemingly without penalty.[114]

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104. Duruigbo, *supra* note 53, at 108.
105. *See* Shaughnessy & Tobin, *supra* note 91, at 20.
106. *Id*.
107. Duruigbo, *supra* note 53, at 108.
108. *Id.*
109. *Id.*
110. *Id.* (citing RONALD MITCHELL, INTENTIONAL OIL POLLUTION AT SEA: ENVIRONMENTAL POLICY AND TREATY COMPLIANCE 163 (The MIT Press, 1994)).
111. Anderson, *supra* note 57, at 164 (citing United Nations Conference on Trade and Development [UNCTAD], *Action on the Question of Open Registries*, TD/B/C.4/220 (1981)).
112. *Id*.
113. *Id. Cf.* FED. R. CIV. P. 12.
114. Anderson, *supra* note 57, at 164 (citing UNCTAD, *supra* note 111). Notice that even a damaged relationship with the flag State probably does not serve as a barrier since owners can reflag.

Critics also claim that FOC vessels lack the shipboard dynamics to self-regulate. -On issues ranging from safety to living standards to environmental stewardship, ship owners can pressure shipboard officers; they, in turn, can manhandle the crew.[115] Since officers and crew work, facing the reality that they can be replaced at the next port, neither can effectively request flag country help[116] or union protection.[117]

Critics point to anecdotal incidents as evidence of FOC States' unsafe records. For example, the Deepwater Horizon rig and the Rena container ship referred to in this paper's introduction[118] were registered in traditional FOC countries, the Marshall Islands[119] and Liberia,[120] respectively. Investigations generally attribute accidents such as these to a lax regulatory scheme and untrained crews.[121]

For example, the 1978 *Amoco Cadiz* oil spill dramatically illustrates the origins of an FOC vessel and the factors that can lead to a maritime disaster. Eight years prior, Amoco incorporated in Indiana and contracted with a Spain-based shipbuilder to construct a supertanker.[122] Representatives from Amoco and the American Bureau of Shipping (ABS)[123] classification society were on-site in Spain during the ship's four-year construction.[124] A wholly-owned Amoco subsidiary incorporated in Liberia accepted delivery of the *Amoco Cadiz* and presently sold it to another Liberian Amoco subsidiary, this one with Bermuda as its principal place of business.[125]

In the ensuing years, ABS periodically inspected and approved the *Amoco Cadiz*.[126] In 1978, on charter to Shell,[127] the *Amoco Cadiz* loaded

115. Anderson, *supra* note 57, at 164.
116. *Id*.
117. *Id*.
118. *See supra* notes 5, 6.
119. Angel Gonzalez, *New Gulf Spill Report Points to Missed Signs*, WALL ST. J. (Aug. 18, 2011), http://online.wsj.com/article/SB10001424053111903596904576514281511893242.html.
120. Press Release, Liberian Registry, *Liberian Registry Cooperating Fully in Rena Salvage* (Oct. 12, 2011), http://www.scoop.co.nz/stories/BU1110/S00369/liberian-registry-co-operating-fully-in-rena-salvage.htm.
121. Anderson, *supra* note 57, at 162.
122. *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1285-86 (7th Cir. Ill. 1992).
123. The American Bureau of Shipping is a classification society that, among other activities, ensures vessels' designs comply with their standards. *Id*. at 1286. *See also* Am. Bureau of Shipping, *What We Do*, www.eagle.org (follow the "About ABS" tab to "What We Do"). It is one of thirteen members of the prestigious International Association of Classification Societies. Int'l Ass'n of Classification Soc'ys, *IACS Explained*, http://www.iacs.org.uk/Explained/members.aspx. *See also* DESOMBRE,*supra* note 81, at 183.
124. *Amoco Cadiz*, *supra* note 122, at 1286.
125. *Id.* at 1287.
126. *Id*.

crude oil in the Arabian Gulf, destined for the Netherlands.[128] Its Italian crew was experienced, its officers licensed, and all had participated in land and sea exercises.[129] The *Amoco Cadiz's* steering gear failed nine miles off of the French coast: the aircraft carrier-sized supertanker was, in maritime parlance, "not under command."[130] A German salvage tugboat responded, though her operations were delayed while the *Amoco Cadiz* captain called Chicago for permission to contract with the tug.[131] The tug's efforts were ultimately futile: the *Amoco Cadiz* crashed against rocks, split in two, and dumped oil covering 144 square miles of ocean.[132]

The trial court determined that the proximate causes of the steering failure were Amoco's failure to maintain the gear, train the crew, provide back-up steering, and notice that the steering construction deviated from the design specifications.[133] In reviewing the substandard State of the steering gear and its maintenance, the circuit court rhetorically asked, "Why did these deficiencies occur? The record is replete with references to the fact that it was Amoco's deliberate policy to defer drydocking and repairs in order to minimize the loss of charter hire that would be incurred by taking the ship out of service."[134] *Amoco Cadiz* illustrates the main grievance against FOCs: their ships do not strictly follow requisite safety regulations.

B. NATIONAL SECURITY

FOC critics also lament that foreign registries deprive home States of critical national defense flexibility[135] and complicate homeland defense activities. A flag State can conscript and requisition its registered vessels in a time of crisis.[136] Every vessel that moves abroad for flagging, then, reduces this emergency capacity. In addition, the merchant marine is critical to war efforts abroad.[137] In 1985, the United States Joint Chiefs

127. Ship chartering is a common business model in which the charterer contracts for the use of the vessel. Of import here, Amoco retained responsibility for the ship's nautical and technical operation. *Cf. Amoco Cadiz*, *supra* note 122.

128. *Amoco Cadiz*, *supra* note 122, at 1287.

129. *Id*.

130. *Id.* at 1288.

131. *Id.*

132. *Id.*

133. *Id.* at 1295 (citing *In re Oil Spill by the AMOCO CADIZ Off the Coast of France on March 16, 1978,* 1984 American Maritime Cases 2123, 2173-88, 2194 (N.D. Ill. 1984)).

134. *Amoco Cadiz*, *supra* note 122, at 1299.

135. *See e.g.,Vessel Operations Under FOC*, *supra* note 87, at 25 (Statement of Schubert, Captain, U.S. Mar. Admin., Dep't of Transp.).

136. RIENOW, *supra* note 42, at 5, 7.

137. Lovett, *supra* note 92, at 57 (discussing private sealift's importance in the Allied WWII victory); *see also* Anderson, *supra* note 57, 21 TUL. MAR. L. J. at 144 (discussing the same in the Falkland's War).

of Staff estimated that in the event of an overseas conflict, 95% of deploying forces and equipment would be transported by sea,[138] and surely merchant mariners would conduct a large portion of this sealift. In the recent Iraq and Afghanistan campaigns, United States-flagged commercial vessels carried 60% of military cargo.[139] While foreign-flagged ships can provide this capacity, critics are concerned about their allegiance to the United States.

In addition, the anonymity of FOC ship owners hinders homeland security. Corporate veneers and forged identifications obscure Coast Guards' abilities to monitor who is visiting ports.[140] Further, critics argue that FOC masters do not responsibly guard against dangerous cargo.[141] Therefore, FOC vessels could be used to stage a terrorist attack[142] or to traffic in illicit goods.[143]

C. HUMAN RIGHTS

Critics additionally aver that FOC registrations are objectionable on human rights grounds because their proceeds may support detestable regimes. For example, vessel registry fees allegedly provided substantial income for Charles Taylor's regime in Liberia.[144]For thoroughness, this paper acknowledges Human Rights as a consideration for critiquing FOC registrations. However, further elaboration of this issue is outside the scope of this paper.

D. CONTRASTING VIEWPOINTS IN SUPPORT OF FOC REGISTRIES

On the other hand, some observers defend FOC registries. They point to a functioning market that provides cheap transportation and data suggesting that FOC States are not racing to the regulatory bottom. They also note that international mechanisms ameliorate many of the critics' concerns.

Defenders assert that the observed variety in registry schemes results from the market catering to the diverse needs of different ship owners, as

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138. Wallace C. Reed, *U.S. Sealift and Nat'l Sec, in* U.S. SHIPPING POLICIES AND THE WORLD MARKET, *supra* note 92, at 261.

139. *Status of U.S.-Flagged Vessels in U.S.-Foreign Trade Before the Transp. And Infrastructure Comm,* 111th Cong. (2010) (statement of John Reinhart, Chairman and CEO Maersk Line Limited), http://transportation.house.gov/hearings/hearingdetail.aspx?NewsID=921 [video].

140. *Vessel Operations Under FOC*, *supra* note 87, at 30-86 (statement of Pluta and Schubert).

141. *Vessel Operations Under FOC*, *supra* note 87, at 79 (statement of Pluta).

142. *Id*.

143. *Vessel Operations Under FOC*, *supra* note 87, at 103 (statement of Alex Vines, Senior Researcher, Human Rights Watch).

144. *Vessel Operations Under FOC*, *supra* note 87, at 14 (statement of Wolf).

opposed to a race to the bottom.[145] Based on this line of thought, the flag State, then, may not actually drive standards; instead, internal corporate culture and mechanisms are determinative. This market clearing contributes to low transportation costs, which are passed on to consumers.

There is also data that critics are off the mark. Open registries have, on average, younger vessels.[146] Since older ships tend to be in greater States of disrepair, this is inconsistent with the belief that ship owners flock to FOC States in pursuit of low safety standards. Similarly, an empirical study found that vessels approved by respected classification societies are more likely to fly an FOC flag.[147] Anecdotally, the *Amoco Cadiz*[148] hardly looks like FOC abuse when examined through a different lens: although it was Liberian-flagged, Amoco hired a premier classification society to oversee construction and conduct periodic checks, and it employed licensed and trained seafarers. In fact, Liberia employs a large team of inspectors and has a reputation for safety.[149] In contrast, the *Exxon Valdez* tanker responsible for the 1989 oil catastrophe near Alaska – one of the largest oil spills in history – was United States-flagged.[150]

Lastly, defenders note that the international community can and has taken steps to reduce the potentially harmful effects of FOC States. These precautions include port and coastal State control, international agreements, domestic shipping protections, financial penalties, and registry requirements. This next section discusses the various international law bases of jurisdiction on which these mitigation measures are based and then turns more specifically to exploring these responses by the international community.

VII. BASES OF JURISDICTION OTHER THAN THE FLAG OF CONVENIENCE

As discussed earlier, the law of the flag is of "cardinal importance" and the internationally recognized starting point in maritime choice of law.[151]There are, though, occasions for concurrent jurisdiction. This

145. *See* RMT, *supra* note 2, at 41 ("Different registries specialize in different vessel types"); *see also* DESOMBRE, *supra* note 81, at 46.
146. RMT, *supra* note 2, at 40-41.
147. Jan Hoffman, Ricardo J. Sanchez, and Wayne K. Talley, *Determinants of Vessel Flag*, in SHIPPING ECONOMICS 185 (Kevin Cullinane ed., 2005).
148. *Amoco Cadiz*, *supra* note 122.
149. DESOMBRE, *supra* note 81, at 98; *see also* Julie A. Perkins, *Ship Registers: An International Update*, 22 TUL. MAR. L. J. 198 (1997-98).
150. Duruigbo, *supra*, note 53, at 117.
151. *Lauritzen*, *supra* note 11, at 585.

section explores these alternate bases of extraterritorial jurisdiction, specifically with reference to their application in maritime law.

The Restatement (Third) of International Conflicts divides jurisdiction into three types: jurisdiction to prescribe, to adjudicate, and to enforce.[152] Prescription grants a State jurisdiction to apply its laws to people and situations.[153] Adjudicative jurisdiction is the ability to subject people to a State's courts.[154] Enforcement allows jurisdiction to punish noncompliance.[155]

This section of the paper focuses on jurisdiction to prescribe and jurisdiction of States to regulate FOCs beyond the law of the flag regime. Enforcement jurisdiction always exists when there is jurisdiction to prescribe.[156] International law recognizes jurisdiction to prescribe in six circumstances: Section VII.A discusses the three concepts of the territoriality principle; Section VII.B looks at the tenuous nationality principle; Section VII.C explains the protective principle; Section VII.D discusses the limited universal jurisdiction principle; Section VII.E takes a look at the weak passive personality principle; and Section VII.F considers flag State permission. Additionally, Section VII.G examines the trump of State sovereignty, which is independent of international law. Section VII.H discusses the choice of law questions resulting from concurrent international jurisdiction. Part VIII then applies these concepts to the FOC challenge.

Some jurisdictional bases are more tenuous than others; consequently, jurisdictional claims can be strengthened by having more than one basis for jurisdiction.[157] As Section VII.H further discusses, a State should decline jurisdiction where it would be unreasonable.[158]

A. TERRITORIALITY PRINCIPLE

The least controversial and most common basis of jurisdiction to prescribe and enforce is the territoriality principle.[159] Territoriality

152. RESTATEMENT, *supra* note 20, § 401. International law cases are referenced through this source.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.* § 431.
157. *Id.* § 401, Comments a, b.
158. *Id.* § 401, Comment a, §403.
159. *Id.* § 402, Comment c.

encompasses three independent concepts: territorial conduct, territorial presence, and territorial effects.[160]

Under territorial conduct, a State can prescribe laws regarding "conduct that, wholly or in substantial part, takes place within its territory."[161] The law of the flag arose naturally from this principle, because a vessel was considered part of the flag State's territory. For example, the Supreme Court relied on the territorial principle and law of the flag in exercising jurisdiction over a murder committed aboard a United States-flagged vessel at port in the Belgian Congo.[162] The law of the flag survived shedding the fallacy of vessels as a literal part of a State's territory, and today scholars are divided on whether it is an exercise of territorial jurisdiction or an independent jurisdiction.[163] The uniformity of this principle, though appealing, is also constraining.

Under the territorial presence concept, a State can prescribe laws regarding "the status of persons, or interests in things, present within its territory."[164] Therefore, vessels in foreign ports are subject to the port State's concurrent jurisdiction. The U.S. Supreme Court annunciated the rationale for this principle in the *Wildenhus*'s Case. The Court noted that a vessel voluntarily enters a foreign port and seeks port State protection during its stay.[165] The Court continued that any other system "would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation."[166] Consequently, "when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes."[167] Decades earlier, in a letter to England, United States Secretary of State Webster similarly argued, "any unlawful acts done by [a vessel] while thus lying in [a foreign] port, and for all contracts entered into while there . . . [she] must, doubtless, be answerable to the laws of the place."[168] He simultaneously affirmed, "[flag State] jurisdiction is preserved over the vessels even in parts of the

160. *Id.* § 402.

161. *Id.Cf. Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co.* [*Aramco*], 499 U.S. 244, 248 ("It is a longstanding principle of American law 'that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" (internal citation omitted). However, Congress has since expanded the scope of legislation).

162. *United Sates v. Flores*, 289 U.S. 137, 155-56 (1933).

163. RESTATEMENT, *supra* note 20, §402 Comment h (advocating that vessel regulation at sea is an independent jurisdictional basis but acknowledging that some view it as part of territorial jurisdiction).

164. *Id.* § 402.

165. *Wildenhus's Case*, 120 U.S. 1, 11 (1887).

166. *Id.* (quoting *The Exchange*, 7 Cranch. 116, 144 (1812)).

167. *Wildenhus's Case*, *supra* note 166.

168. *Rodgers*, *supra* note 29, at 264-65.

sea subject to a foreign dominion."[169] This next section of the paper returns to the choice of law question that obviously arises.[170]

Under the territorial effects principle, a State can prescribe laws regarding "conduct outside its territory that has or is intended to have substantial effect within its territory."[171] Potentially nearly boundless, the effects principle is generally limited to cases of substantial effect.[172] It is not widely applied in the maritime context. In one of the few U.S. maritime cases relying on the territorial effects principle, the Third Circuit upheld drug-related charges against foreigners apprehended on the high seas aboard a Panamanian ship.[173] Although the U.S. Coast Guard intercepted the ship in international waters, the defendants were convicted under U.S. statutes of possession with unlawful intent to import marijuana, conspiracy to import marijuana, and possession with intent to distribute marijuana.[174] Of central importance, the trial court found that the smugglers were heading for the United States, thus providing a substantial domestic effect.[175] Of note, the Circuit Court actually expanded the traditional effects principle: it found that international law permitted extraterritorial jurisdiction if effects are *intended* to be domestic,[176] even if they are not consummated.[177] Such jurisdiction was reasonable, the court found, because the domestic effect was foreseeable, other States had an interest in regulating this activity, and there was no comity concern.[178]

There are few other United States maritime cases relying on territorial effects. The Eleventh Circuit recognized the effects principle as a basis of maritime jurisdiction in dicta, though it relied only on the Restatement (Second) of Foreign Relations,[179] Supreme and Appellate Courts

169. *Id.* at 264.
170. *See infra* notes 213-241 and accompanying text. *Cf.* Symeon Symeonides, *Symposium on Choice of Law and Admiralty: Maritime Conflicts of Law From the Perspective of Modern Choice of Law Methodology*, 7 TUL. MAR. L. J. 223, 224 (1982) ("[T]here is hardly any area of conflicts law . . . where governments are more immediately interested in the outcome of litigation between the private parties than in the maritime context.")
171. RESTATEMENT, *supra* note 20, § 402.
172. *Id.* § 402, comment d.
173. *United States v. Wright-Barker*, 784 F.2d 161, 165-66 (3d Cir. N.J. 1986).
174. *Id*. at 166.
175. *Id*. at 169.
176. *Id*. at 168 (citing RESTATEMENT, *supra* note 20, § 402).
177. *Wright-Barker*, *supra* note 174, at 167 (citing *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 18 (1965)).
178. *Wright-Barker, supra* note 174, at 168.
179. *Marino-Garcia*, *supra* note 43, at 1382 (citing RESTATEMENT (SECOND) OF FOREIGN RELATIONS, supra note 178, § 18).

decisions in non-maritime cases,[180] and appellate decisions in maritime cases involving conspiracy.[181] It has also been applied to a human smuggling prosecution[182] and to documents forged to conceal an oil discharge.[183]

B. NATIONALITY PRINCIPLE

The nationality principle, or jurisdiction of "activities, interests, status, or relations of its nationals outside as well as within its territory,"[184] is an exceptional jurisdictional basis that may need to be bolstered with an additional basis.

The U.S. Supreme Court in part relied on the nationality principle when it upheld a Florida State court's conviction of an American deep-sea diver for illegally removing sponges in the Gulf of Mexico.[185] The Court dismissed the defendant's central contention that Florida impermissibly applied its laws outside of State jurisdiction: "the United States is not debarred by any rule of international law from governing the conduct *of its own citizens* upon the high seas or even in foreign countries when the rights of other nations or their nationals are not infringed."[186] The Court supplemented the defendant's American nationality with a version of the territoriality effects principle in holding, "Thus, a criminal statute dealing with acts that are directly injurious to the government and are capable of perpetration without regard to particular locality, is to be construed as applicable to citizens of the United States upon the high seas or in a foreign country."[187] This case is one of many that shows how U.S. courts must supplement their decision when applying the nationality principal.

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180. *Marino-Garcia*, *supra* note 43, at 1382 (citing *Strassheim*, *supra* note 178, at 285); *United States v. Baker* 609 F.2d, 134, 138 (5th Cir. Fla. 1980); *Rivard v. United States*, 375 F.2d 882 (5th Cir. Tex. 1967), *cert. denied*, 389 U.S. 884 (1967)).

181. *Marino-Garcia*, *supra* note 43, at 1382 (citing *United States v. Gray*, 659 F.2d 1296, 1298 (5th Cir. Tex.1981); *United States v. DeWeese*, 632 F.2d 1267, 1271 (5th Cir. Fla. 1980), *cert. denied*, 454 U.S. 878 (1981); *United States v. Ricardo*, 619 F.2d 1124, 1129 (5th Cir. Texas 1980), *cert. denied*, 449 U.S. 1063 (1981)).

182. *United States v. Best*, 172 F. Supp. 2d 656, 661 (D.V.I. 2001) (holding that the effects principle grants subject matter jurisdiction but dismissing the human trafficking indictment due to lack of personal jurisdiction); *United States v. Viegers*, 1994 U.S. Dist. LEXIS 16122 *4 (D.V.I. 1994).

183. *United States v. Royal Caribbean Cruises, LTD.*, 11 F. Supp. 2d 1358, 1364 (S.D. Fla. 1998). This was a particularly liberal application of the domestic effects principle: the court found a domestic effect in undermining the U.S. Coast Guard.

184. RESTATEMENT, *supra* note 20, § 402 Comment b.

185. *Skiriotes v. Florida*, 313 U.S. 69, 69-70 (1941).

186. *Id.* at 73 (citations omitted) (emphasis added).

187. *Id.* at 73-74 (citations omitted).

C. PROTECTIVE PRINCIPLE

The protective principle enables a State to prescribe laws with respect to conduct "directed against the security of the State or against a limited class of other State interests."[188] Reachable conduct is restricted to the limited class of offenses "that are generally recognized as crimes by developed legal systems," such as espionage, counterfeiting, official document falsification, perjury, and immigration violations.[189]

In the maritime context, courts often discuss this principle with respect to the Maritime Drug Law Enforcement Act, which criminalizes drug possession on "a vessel subject to the jurisdiction of the United States."[190] Congress specifically stated in the Act that drug trafficking is universally condemned and threatens U.S. security.[191] In the cases reviewed for this paper, courts maintained only in *dicta* that the protective principle could be a basis of jurisdiction;[192] they instead relied on flag country permission to find jurisdiction.[193]

D. UNIVERSAL JURISDICTION PRINCIPLE

Under universal jurisdiction, a State may prescribe laws regarding "certain offenses recognized by the community of nations as of universal concern."[194] These offenses, such as piracy, slave trade, genocide, and war crimes,[195][196] are determined by customary and positive international law, and are evidenced by a universal condemnation and desire to control; there need not be any other link.[197] For example, United States

188. RESTATEMENT, *supra* note 20, §402.
189. *Id.* § 402, Comment f.
190. *United States v. Vilches-Navarrete*, 523 F.3d 1, 8 (1st Cir. P.R. 2008) (quoting 46 U.S.C. § 70503(a)(1)).
191. *United States v. Cardales*, 168 F.3d 548, 553 (1st Cir. P.R. 1999) (quoting 46 U.S.C. app. § 1902).
192. *See e.g., Vilches-Navarrete*, *supra* note 191, at 21-22 (Lynch, J., concurring); *United States v. Gonzales*, 311 F.3d 440, 446 (1st Cir. P.R. 2002) (Torruella, J., concurring); *Cardales*, *supra* note 192, at 553.
193. *Vilches-Navarrete*, *supra* note 191, at 11; *Cardales*, *supra* note 192, at 553.
194. RESTATEMENT, *supra* note 20, § 404.
195. *Id.* § 404, Comment a.
196. It is the author's contention that there is no universally accepted list of what crime constitutes a universal concern. It has been proposed that the United Nations has a specific list of crimes that would be of a universal concern, including: piracy, slavery, crimes against humanity, war crimes, torture, and genocide. However, it can be argued on the contrary that not all parties would agree to the UN's "universal" list. For the UN's universal list, please see, http://www.amicc.org/docs/Universal%20Jurisdiction%20Q&A.pdf.
197. RESTATEMENT, *supra* note 20,§ 404.

Supreme Court Chief Justice Marshall stated that pirates can be prosecuted by any State.[198]

Although this principle is well settled as a jurisdictional basis, defining its contours is contentious. The standard is so high that even terrorist activities are not prescribed under this jurisdiction.[199] Consider the criteria the United States First Circuit used in declining to hold drug trafficking as a universal offense: it is neither an "attack on the international legal order"[200] nor "'so inhumane, so shocking to the conscience, that it makes all jurisdictional' considerations irrelevant."[201] This surprising case holding is just one example of the difficulty in applying this principal.

E. PASSIVE PERSONALITY PRINCIPLE

Under the passive personality principle, a State may prescribe laws if the victim is a national of that State.[202] It is a tenuous basis for jurisdiction[203] and consequently is often coupled with another jurisdictional basis or additional jurisdictional hooks.

For example, the United States Ninth Circuit sustained a conviction against a St. Vincent and the Grenadines citizen for sexual contact with an American minor aboard a Panamanian-flagged cruise ship in Mexican waters.[204] In finding jurisdiction, the court relied heavily on both the victim's nationality and the cruise ship's other United States contacts: it departed from and returned to a California port.[205]

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198. *United States v. Klintock*, 18 U.S. 144, 152 (1820). While this pronouncement was arguably dicta, the Court considered it binding in a case later in the same term. *United States v. Holmes*, 18 U.S. 412, 416 (1820).

199. *United States v. Yousef*, 327 F.3d 56, 107 (2d Cir. N.Y. 2003); RESTATEMENT, *supra* note 20, § 404, Comment a.

200. *United States v. Cardales-Luna*, 632 F.3d 731, 746 (1st Cir. P.R. 2011) (U. PENN. PRESS, NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW, 178-79 (Stephen Macedo ed. 2004)).

201. *Cardales-Luna*, 632 F.3d 731, 746 (1st Cir. 2011) (quoting Eugene Kontorovich, *Beyond the Article I Horizon*: *Congress's Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 MINN. L. REV. 1191, 1226 (2009)). But *cf. United States v. Estupinan*, 453 F.3d 1336, 1339 (11th Cir. Fla. 2006) (suggesting that drug trafficking is universally condemned).

202. RESTATEMENT, *supra* note 20, § 402, Comment g.

203. *See Marino-Garcia*, *supra* note 43, at 1382 n.15 ("The [passive] principle, however, has generally not been accepted in this country as a basis for jurisdiction." (citations omitted)); *United States v. Neil*, 312 F.3d 419, 423 (9th Cir. Cal. 2002) ("[I]n general, the passive personality principle has not been accepted as a sufficient basis for extraterritorial jurisdiction over ordinary torts and crimes." (citations omitted)).

204. *Neil*, *supra* note 203, at 420.

205. *Id.* at 422.

F. FLAG STATE PERMISSION

A State may board a foreign ship on the high seas if the flag State grants permission.[206] In some circumstances, the boarding State may even apply its domestic law.[207] This appears to be an outgrowth of the principle that a State may bind itself by agreement.[208]

For instance, in the *Cardales-Luna* case, Venezuela authorized the U.S. Coast Guard to board and apply United States law to a Venezuelan vessel 150 miles south of Puerto Rico.[209] Upon finding marijuana aboard, the foreign crew was apprehended and charged with violating the Maritime Drug Law Enforcement Act.[210] The defendants contested that the Act did not provide jurisdiction over them, because they had no nexus with the United States. The court disagreed that due process or international law was violated because "the flag nation's consent eliminates any concern that the application of United States law may be arbitrary or fundamentally unfair."[211]

G. STATE SOVEREIGNTY

Some jurists and scholars further argue that Congress can reach overseas, even in the absence of an enumerated basis, so long as it acts in accordance with the Constitution.[212] For example, Justice Scalia in his dissent recognized this Congressional power in writing, "*[t]hough it clearly has constitutional authority to do so*, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe."[213] Some also claim an analog to this

206. RESTATEMENT, *supra* note 20, § 522. *See also United States v. Suerte*, 291 F.3d 366, 375-76 (5th Cir. Tex. 2002) (holding that as a matter of "generally accepted international law" a flag State can invite another State's jurisdiction).

207. *See Cardales-Luna*, *supra* note 200, at 553; *United States v. Robinson*, 843 F.2d 1, 4 (1st Cir. Mass. 1988) (holding that because international agreement can be the basis of extraterritorial legal prescription, State authorization to apply foreign law to its vessel is legitimate).

208. *See, e.g.*, *The Schooner Exch. v. McFaddon*, 11 U.S. 116, 135 (1812) ("All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself.").

209. *Cardales-Luna*, *supra* note 200, at 552.

210. *Id*.

211. *Suerte*, *supra* note 206, at 371 (citations omitted).

212. Congress would have to expressly declare this intention to avoid the long-standing canon of construction which dictates reading statutes as complying with international law. *Lauritzen*, *supra* note 11, at 578 (referencing Marshall, C.J., in *The Charming Betsy*, 2 U.S. 64, 118 (1804)).

213. *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting in part) (emphasis added) (neither the majority nor the dissent relied on this Congressional authority). *Accord United States v. Martinez-Hidalgo*, 993 F.2d 1052, 1056 (3d Cir. V.I. 1993) ("There is, of course, no doubt the Congress may override international law by clearly expressing its intent to do so."); *United States v. James-Robinson*, 515 F. Supp. 1340, 1343 (S.D. Fla. 1981) ("An American statute may override international law, but only when Congress has expressed the clear intent to supersede the existing law of nations." (citations omitted)).

sovereignty: the Court has asserted that maritime law has no domestic force unless it is accepted by the United States.[214]

H. CHOICE OF LAW IN THE UNITED STATES

Differences between territorial jurisdiction and the law of the flag necessarily present a conflict of laws. In evaluating a statute to determine if a different jurisdictional basis should apply, U.S. courts look to Congressional intent and principles of international law. Courts first evaluate if Congress intended for a statute to apply extraterritorially. If so, courts inquire if Congress intended to contravene the law of nations[215] or more narrowly to go to the limits of international law. When Congressional intent is clear, the analysis is simplified. When Congressional intent is not easily discernible, the courts look to principles of international law.

When Congressional intent to exceed international law is clear, courts often recognize its right to do so. Broadly, the U.S. Supreme Court has declared, "When it desires to do so, Congress knows how to place the high seas within the jurisdictional reach of a statute."[216] More specifically, the Carriage of Goods by Sea Act extends U.S. jurisdiction to "[e]very bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade."[217] The Fifth Circuit presumptively applied this Act: "We have no difficulty in finding the threshold jurisdictional requirement" to a flagless barge[218] that sank on an internal waterway between German ports[219] and had a bill of lading opting for Belgian law.[220] The barge was ultimately destined for a "mother ship" that would transport it to New Orleans.[221]Although applying the Carriage of Goods by Sea Act to this situation almost certainly exceeded

214. *Lauritzen*, *supra* note 11, at 578 (" "The law of the sea," we have had occasion to observe, is in a peculiar sense an international law, but application of its specific rules depends upon acceptance by the United States." quoting *Farrell v United States*, 336 U.S. 511, 517 (1949)).

215. *Hartford Fire*, *supra* note 213, at 813-15 (Scalia, J., dissenting).

216. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989). The Court cited three such examples of extraterritorial intent: 14 U.S.C. § 89(a), which permits Coast Guard seizure of vessels on the high seas; 18 U.S.C. § 7, which extends criminal jurisdiction over U.S. vessels to the high seas; and 19 U.S.C. § 1701, which permits the President to establish customs-enforcement areas on the high seas. *Id*. at 440, n.7.

217. *Wirth, Ltd. V. S/S Acadia Forest*, 537 F.2d 1272, 1275 n.6 (5th Cir. La. 1976) (quoting 46 U.S.C.A. § 13000).

218. *Id*. at 1279. A significant matter for the litigation was whether this particular type of barge should be considered a ship and required to have a flag.

219. *Id.* at 1275.

220. *Id.* at 1275 n.6.

221. *Id*. at 1278.

international law,[222] the court seemingly found Congress's intent to do so clear.

The U.S. Supreme Court has also upheld application of United States law to foreign ships' internal matters while in U.S. ports, traditionally an area for flag State jurisdiction.[223] The Seaman's Act of March 4, 1915, applies wage payment provisos to "seamen on foreign vessels while in harbors of the United States."[224] When a British seafarer invoked the Act against his British ship despite his British contract, the Court found that Congress's purpose was "to place American and foreign seamen on an equality of right in so far as the privileges of this section are concerned."[225] Therefore, the Court subjected the British ship to the Seaman's Act.[226]

Similarly, courts have heeded Congress's desire that the Limitation of Liability Act apply to "the owner of any vessel whether American or foreign."[227] Although this statute often runs into direct conflict with foreign law, courts apply it to incidents lacking any American connection beyond a port of call.[228] Courts have additionally extended Congress's extraterritorial intent to seamen's rights[229] and drug trafficking with no U.S. nexus.[230]

When Congressional intent is unclear, canon of construction compels that a statute be read as consistent with international law.[231] Courts must also evaluate international law's boundaries when Congress intends to reach, but not exceed, the limits of international law. In the maritime context, that analysis of international law is guided by "the needs of a general federal maritime law and with due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community."[232]

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222. *Id*. at 1282-83.
223. *See infra* notes 231-43 and accompanying text: the holistic reasonableness test described below.
224. *Strathearn S.S. v. Dillon*, 252 U.S. 348, 353 (1920).
225. *Id.* at 353.
226. *Id.* at 355.
227. Symeonides, *supra* note 171, at 230-31 (quoting 46 U.S.C. §183(a) (1976)).
228. *Id.* at 234.
229. *See infra* note 310 and accompanying text discussing the Jones Act.
230. *See supra* notes 189-190 discussing Maritime Drug Law Enforcement Act.
231. *Hartford Fire*, *supra* note 213, at 815 (Scalia, J., dissenting).
232. *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959).

The Restatement and court opinions are illustrative of what considerations inform this analysis. The Restatement conditions jurisdiction on an all-inclusive reasonability constraint.[233] Relevant criteria include: the locus of the offense and its effects, other connections such as offender or victim nationality, the relative importance of the regulation to the State or to the international system, the existence of individual expectations and international traditions, and the likelihood of interstate conflict.[234]

The U.S. Supreme Court in *Lauritzen v. Larsen* delineated similar factors when it considered a Danish seaman's suit against a Danish-flagged vessel for a tort suffered near Cuba.[235] The only connection with the United States was that the seaman signed his employment contract in New York.[236] By its terms, the Jones Act[237] included United States jurisdiction over maritime torts that occur anywhere, but it was unclear if Congress actually intended for such broad extraterritorial application in violation of international law.[238] The Court, mindful of "considerations of comity, reciprocity and long-range interest,"[239] considered the place of the wrongful act, the flag, the victim's domicile, the offender's domicile, the place of contract, the accessibility of a foreign forum, and the law of the forum.[240] Ultimately, the Court concluded that domestic jurisdiction would be unreasonable.[241] The *Lauritzen* factors, though neither exhaustive nor mechanical,[242] continue to guide maritime choice of law.[243]

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233. RESTATEMENT, *supra* note 20, § 403. *See also Hartford Fire*, *supra* note 213, at 818 (Scalia, J., dissenting) (relying on § 403 to evaluate the extraterritorial reach of the Sherman Antitrust Act).

234. RESTATEMENT, *supra* note 20, § 403.

235. *Lauritzen*, *supra* note 11, at 573.

236. *Id.*

237. "*Any seaman* who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law." 46 U.S.C. § 688 (revised as 46 U.S.C. § 30104) quoted in *Lauritzen*, *supra* note 11, at 582 (emphasis added).

238. *Lauritzen, supra* note 11, at 577-78.

239. *Id.* at 582.

240. *Id.* at 583-91.

241. *Id.* at 592-93.

242. *Hellenic Lines v. Rhoditis*, 398 U.S. 306, 308-09 (1970).*Cf. Romero*, *supra* note 232, at 382-83 ("These [choice of law] principles do not depend upon a mechanical application of a doctrine like that of *lex loci delicticommissi*.").

243. *Lauritzen*, *supra* note 11, at 573, 581 (explaining that the choice of law question is guided by "the usual doctrine and practices of maritime law"). *See Hartford Fire*, *supra* note 213, at 820-22 (citing *Lauritzen* as in accord with RESTATEMENT, *supra* note 20, § 403); *Romero*, *supra* note 232, at 382 ("The broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally." (citing *Lauritzen*, *supra* note 11, at 577)). *See also* Symeonides, *supra* note 171, at 238. Some courts consider an eighth factor. *See infra* notes 301-305 and accompanying text.

VIII. EFFORTS TO MAINTAIN ORDER OF THE SEAS

FOC States will remain a significant part of global commerce. Their potential to disrupt the fragile maritime order is unambiguous, though experientially, their impact is mixed. The international community's response to FOC registrations has probably been a significant factor in maintaining order. This section reviews what these responses have been and how else the international community could use international law to avert FOC vessels' potential abuses.

Section VIII.A discusses port State's responses to FOCs. Section VIII.B explores coastal State responses to FOCs. Section VIII.C studies international efforts to create minimum registry requirements. Section VIII.D considers international agreements designed to maintain maritime order. Section VIII.E discusses the utility of universal jurisdiction in maintaining maritime order. Section VIII.F examines the litigation remedy provided by lifting the corporate veil. Section VIII.G reviews States' use of the nationality principle to reach blameworthy actors. Section VIII.H considers States' programs to encourage domestic shipping. Finally, Section VIII.I discusses States' prerogative to contravene international law.

A. PORT STATE CONTROL

Port States, acting under the territorial presence principle, inspect foreign ships visiting their ports. Precedent suggests that jurisdiction is limited to matters that affect the port, as opposed to those that are purely internal to the ship. Although this port State control is a highly relevant factor in maintaining shipping standards – one author calls it "the most effective cure of the malaise of the maritime industry"[244] – it has its limitations.

A vessel's voluntary entrance into a foreign port subjects it to that port's laws under the territorial presence principle.[245] However, courts have eschewed such broad application because of its deleterious effects on commerce.[246] Instead, jurisdiction remains with the flag State unless the vessel's master or flag State requests intervention, the port State's national interests are implicated, or the offense disturbs the port's peace

244. John Hare, *Port State Control: Strong Medicine to Cure a Sick Industry*, 26 GA.J. INT'L & COMP. L. 571, 571 (1997).

245. *See Wildenhus*, *supra* note 166, at 120.

246. *Wildenhus*, *supra* note 166, at 12 ("From experience, however, it was found long ago that it would be beneficial to commerce if the local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel or among themselves.").

or involves a non-crew member.[247] For example, cognizant of foreign relations and economic impacts,[248] and sensitive to the "onerous" and "speculative burden" of subjecting a ship to different rules because she is fortuitously in a particular port when a claim arises,[249] the U.S. Supreme Court declined to exercise jurisdiction over a Spanish seafarer injured aboard a Spanish-flagged vessel in a New Jersey port.[250]

Arguably, this division has come under stress in the modern exercise of port State control. Port State control agreements extrapolate from a port State's right to control its ports and reach a port State's right to control access to its ports.[251] Port States then condition access on compliance with labor, safety, and environmental measures that have an effect beyond the port itself.[252] For example, port States may investigate whether a ship "threatens damage to the marine environment."[253] They may even inquire into some internal ship matters, such as crew living conditions.[254] Perhaps in acknowledgment of traditional notions of port State control, generally only international—rather than domestic—regulations are applied to visiting foreign vessels.[255]

The mechanics of port State control are straightforward. A port State requires ships to announce their anticipated arrival and conducts a preliminary analysis.[256] It selects ships to inspect, based on factors including the type of ship, its detention record, and its classification society.[257] Most significantly for present purposes, the port State also considers the detention rates of the vessel's flag State.[258] In addition to a

247. Ademuni Odeke, *Port State Control and UK Law*, 28 J. MAR. L. & COM. 657, 660 (1997). *See also Wildenhus*, *supra* note 166, at 12 ("And so by comity it came to be generally understood among civilized nations that all matters of discipline and all things done on board which affected only the vessel or those belonging to her, and did not involve the peace or dignity of the country, or the tranquility of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged.").

248. *Romero*, *supra* note 232, at 382-83.

249. *Id.* at 384.

250. *Id.*

251. DESOMBRE, *supra* note 81, at 89.

252. Hare, *supra* note 244, at 583 n.23. (referencing the International Convention on Load Lines; Safety of Life at Sea (and its protocols); International Convention for the Prevention of Pollution from Ships; Standards of Training, Certification and Watchkeeping; Convention on the International Regulations for Preventing Collisions at Sea, International Convention on Tonnage Measurement of Ships, Merchant Shipping Convention 1976 (ILO Convention No. 147).

253. UNCLOS, *supra* note 17, at Art. 219. *See also* Arts. 216-220 quoted in DESOMBRE, *supra* note 81, at 90.

254. DESOMBRE, *supra* note 81, at 90 (discussing The Merchant Shipping (Minimum Standards) Convention (1976)).

255. *See id.*

256. Hare, *supra* note 244, at 583 n.37 (citing Ports and Waterways Safety Act, 33 U.S.C.A. §§ 1221-1232 (1986)).

257. DESOMBRE, *supra* note 81, at 93-94.

258. *Id.* at 95.

visual examination of general condition, a preliminary inspection involves a document examination to ensure compliance with international agreements, valid registration, and current classification and insurance.[259] A more involved inspection ensues if authorities uncover disparities.[260] The nature of violations dictates the port authority's response: it may refer the vessel to the flag State[261] or it may detain the ship until the violation is rectified.[262] Memorandums of Understanding among port States cover most of the world and help maximize the number of inspected vessels.[263] In theory, this system should encourage flag States to adopt stricter standards to help their registered vessels avoid costly inspections and potential detentions.[264] In fact, a survey of UK and Isle of Man ships found that ship owners chose those registries, in part, to reduce the potential for port State inspections.[265]

Port State control is not a panacea, though. Observers point out that port States are unlikely to exercise jurisdiction when their interests are not directly involved, such as an oil discharge hundreds of miles from the coast, because such involvement is onerous and may reduce future port visits.[266] Observers additionally allege that some port States falsify reports or free ride by relying on the stricter controls of other port States' to protect them.[267]

Country-specific studies offer mixed results. An investigation of flagging standards suggests that while port State control stemmed a "race to the bottom," it is insufficient to prompt every vessel to reach the highest standards.[268] Instead, it results in a "race to the middle," in which the majority of registries have modest standards.[269] In this race to the middle, bottom-dwellers raise their standards to reduce inspections but other countries emerge to replace them.[270] The investigation's author

259. *Id.* at 92.
260. *Id. See also* UNCLOS, *supra* note 17, at Art. 222(1).
261. DESOMBRE, *supra* note 81, at 90-91. *See also* UNCLOS, *supra* note 17, at Art. 222(1).
262. DESOMBRE, *supra* note 81, at 89-90. *See also* UNCLOS, *supra* note 17, at Art. 219, 222(1).
263. DESOMBRE, *supra* note 81, at 91.
264. Anderson, *supra* note 57, at 168. The flag State's incentives are reinforced by the International Transport Workers' Foundation, which targets high detention rate countries for labor actions. DESOMBRE, *supra* note 81, at 97.
265. Brooks, Mary R. & J. Richard Hodgson, *The Fiscal Treatment of Shipping*, *in* SHIPPING ECONOMICS 160-61 (Elsevier Ltd., 2005) (citing Kevin Cullinane & Mark Robertshaw, *The Influence of Qualitative Factors in Isle of Man Ship Registration Decisions,* 23 MAR. POL'Y & MGMT. (Issue 4) 321-37 (1996)).
266. Duruigbo, *supra* note 53, at 132.
267. DESOMBRE, *supra* note 81, at 97.
268. *Id.* at 53.
269. *Id.*
270. *Id.* at 99.

compared individual flag detention rates to international averages, and discovered that port State control raised the flagging standards of Liberia, the Marshall Islands, Vanuatu, and Cyprus.[271] However, some FOC States remained undeterred by baneful reputations and their costs for ship owners. For example, despite persistently high detention rates, Honduras made only a small effort to purge the lowest standard ships from its registry.

B. COASTAL STATE CONTROL

Seemingly relying on the territorial effects principle, the international community has bolstered coastal State prescriptive and enforcement powers for civil and criminal matters. Recall that under territorial effects, States can exercise jurisdiction over people and activities that have or are intended to have a substantial effect within their territory. Since effects are diminished as a vessel moves seaward, a coastal State's jurisdiction correspondingly decreases.[272]

Coastal State civil jurisdiction is at its maximum in territorial waters. Under UNCLOS, vessels in territorial waters retain a diminished freedom of navigation called innocent passage, which permits "continuous and expeditious" passage that is "not prejudicial to the peace, good order or security of the coastal State."[273] Coastal States may adopt and enforce regulations relating to *inter alia*, "safety of navigation . . . fisheries laws and regulations of the coastal State . . . [and] the preservation of the environment of the coastal State."[274] These rules can be more stringent than international rules, though they cannot hamper innocent passage.[275] For example, a coastal State may inspect and even detain a vessel navigating the territorial seas if it has "clear ground for believing" the vessel violated international environmental regulations while in its territorial seas.[276] Coastal States also have criminal jurisdiction of vessels in their territorial waters. UNCLOS limits this jurisdiction to instances in which the crime's consequences affect the coast State, the crime disturbs order of the territorial sea, the crime involves drug trafficking, or the ship's master or flag State requests assistance.[277]

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271. *Id.* at 98-127.
272. *See infra* notes 274-280.
273. UNCLOS, *supra* note 17, at Arts. 18-19.
274. *Id.* at Art. 21.
275. *Id.* at Art. 24, 211(4); 220(2); Duruigbo, *supra* note 53, at 122.
276. UNCLOS, *supra* note 17, at Art. 220(3).
277. *Id.* at Art. 27. *See also supra* Section VII. Bases of Jurisdiction Other than the Flag of Convenience.

In the next zone seaward, the contiguous zone, a coastal State's prescriptive jurisdiction is restricted to "prevent[ing] infringement of its customs, fiscal, immigration or sanitary laws and regulations."[278] Similarly, in the exclusive economic zone, enforcement jurisdiction is significantly reduced. A port State can only detain a vessel when it reaches a higher standard of proof of more direct damage.[279] Normally, the coastal State simply gathers registry and last and next ports of call information for violations in the exclusive economic zone.[280]

C. REGISTRY REQUIREMENTS

In a much-discussed but largely ineffective approach, the international community attempted to qualify vessel registrations. Specifically, it mandated a "genuine link" between the registering State and vessel. This approach epitomizes the tension between traditional maritime principles and challenges of the new order: the international community has struggled to define "genuine link" in light of the understanding that State sovereignty includes the right to set registry terms.

The "genuine link" language arose from the *Nottebohm Case*, which held that an *individual's* citizenship is based on "a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties."[281] Three years later, the Convention on the High Seas asserted, "[t]here must exist a genuine link between the State and the ship."[282] Seemingly contradictorily, it also affirmed that "[e]ach State shall fix the conditions for the grant of its nationality to ships."[283] A quarter-century later, UNCLOS incorporated nearly identical language.[284] The Restatement similarly outlines a genuine link requirement, while acknowledging that States must recognize flags that lack such a link.[285]

The genuine link requirement has been largely toothless for at least two reasons. First, as indicated above, the documents themselves seem to schizophrenically condition a State's right to register and simultaneously

278. UNCLOS, *supra* note 17, at Art. 33.
279. *Id.* at Art. 220(6).
280. *Id.* at Art. 220(3). Under some heightened circumstances, the coastal State can inspect the vessel. *Id.* at Art. 220(5).
281. *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4 (Apr. 6), at 23. *See also* Anderson, *supra* note 57, at 149; Duruigbo, *supra* note 53, at 118.
282. 1958 Convention, *supra* note 19, at Art. 5.
283. *Id.*
284. *See* UNCLOS, *supra* note 17, at Art. 91(1) ("Every State shall fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory, and for the right to fly its flag . . . There must exist a genuine link between the State and the ship.").
285. RESTATEMENT, *supra* note 20, § 501 Comment b.

grant a sweeping right to register.[286] Second, "genuine link" is inadequately defined. *Nottebohm* discusses "reciprocal rights and duties," but in the context of vessel registration – vice human citizenship – rights and duties seem to arise from, rather than precede, registering.[287] This view is reinforced by an explanatory clause following the 1958 Convention's genuine link requirement: "in particular, the State must effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag."[288] Thus, it appears that a genuine link exists when a State exercises jurisdiction, which it would only do after a vessel is registered.[289]

The United Nations Convention on Conditions for Registration of Ships (UNCCORS)[290] attempted to close this gap by defining genuine link. Specifically, it required that States either[291] prescribe the "level of [national ownership] participation"[292] or mandate that "a satisfactory part" of the officers and crews are nationals.[293] However, it failed to define what constitutes a sufficient "level of participation" or a "satisfactory part."[294] Therefore, UNCCORS probably does not add teeth to the genuine link requirement.[295]

The international community has also tried to regulate standards. For example, UNCLOS demands that flag States promulgate pollution laws that "have the same effect as that of generally accepted international rules and standards."[296] However, of the jurisdictional bases discussed earlier, none applies to pollution laws; that is covered only by international agreements. Thus, there is seemingly no jurisdictional basis for enforcement of these regulations other than international agreement. Further, it is unclear what consequences result from ignoring this requirement.

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286. *See supra* notes 281-285.
287. Anderson, *supra* note 57, at 149.
288. 1958 Convention, *supra* note 19, at Art. 5.
289. *See* Anderson, *supra* note 57, at 150.
290. United Nations Convention on Conditions for Registration of Ships, May 1 1986-Apr. 30 1987, 26 I.L.M. 1229 (1987) [hereinafter UNCCORS].
291. *Id. at* Art. 7.
292. *Id. at* Art. 8.
293. *Id.* at Art. 9.
294. Anderson, *supra* note 57, at 151.
295. *Id.Cf* Duruigbo, *supra* note 53, at 120 (arguing that UNCCORS may be a minor addition to the genuine link definition).
296. UNCLOS, *supra* note 17, at Art 211(2). *See also id.* at Art. 217.

D. INTERNATIONAL AGREEMENTS

International agreements are another widely used mechanism to maintain order on the seas among FOC vessels. Recall that States, which as a matter of sovereignty can limit their own sovereignty, can grant jurisdiction to foreign States. International conventions such as UNCLOS, is one such example. The International Maritime Organization, a United Nations body, has passed a number of other conventions related to, among other topics, safety, pollution, and liability.[297] In addition, States often sign smaller, more targeted agreements. For example, the United States has negotiated twenty-six bilateral agreements permitting U.S. enforcement of U.S. maritime drug laws on foreign vessels.[298]

While surely useful, international agreements also have shortcomings. First, they may counterproductively encourage nefarious ship owners to register in precisely those States that are most detached from the international community. Second, agreements cannot possibly cover every eventuality. Third, there is a significant time lag between identifying a problem, agreeing to convention terms, and achieving domestic ratification.[299]

E. UNIVERSAL JURISDICTION

Universal jurisdiction, or jurisdiction over activities that are condemned by international law, offers just a toehold for maintaining maritime order, because few crimes rise to this level of concern. UNCLOS only permits high seas seizure of a foreign ship in the event of piracy.[300] UNCLOS more liberally grants the right to board a foreign vessel on the high seas when there is reasonable suspicion that it is engaged in piracy, the slave trade, or unauthorized broadcasting, that it is without nationality, or that it is obscuring its nationality as identical to the boarding ship's.[301]

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297. *See List of IMO Conventions*, INTERNATIONAL MARITIME ORGANIZATION, http://www.imo.org/About/Conventions/ListOfConventions/Pages/Default.aspx (last accessed March 18, 2013).

298. *Cardales-Luna*, *supra* note 200, at 742.

299. *Introduction: Adopting a Convention, Entry Into Force, Accession, Amendment, Enforcement, Tacit Acceptance Procedure*, INTERNATIONAL MARITIME ORGANIZATION, www.imo.org/About/Conventions/Pages/Home.aspx (last visited March 18, 2013). Novel acceptance procedures, such as not requiring States' affirmative acceptance for technical amendments, in part alleviate this lag.

300. UNCLOS, *supra* note 17, at Art. 105. *But see Cardales-Luna*, *supra* note 200, at 746 (asserting that UNCLOS also considers the slave trade as universally condemned under UNCLOS Art. 99). UNCLOS Art. 99 instructs flag States to punish the transport of slaves; it does not permit universal jurisdiction over slave transport ships.

301. UNCLOS, *supra* note 17, at Art. 110.

F. LIFT THE CORPORATE VEIL

In addition, courts sometimes resist the mechanical application of the law of the flag when they believe a ship's flag poorly reflects its activities. Instead, they lift the corporate veil to reach the ship's true owners via domestic jurisdiction. Courts inconsistently lift the corporate veil which, if applied universally, would seemingly unravel not just flags of convenience but also the law of the flag, generally. Therefore, it is difficult to annunciate a unifying rule.

Generally, United States' courts use the multi-factor *Lauritzen* test, which resembles the Restatement's reasonability test, to evaluate the reach of international law.[302] Sporadically, they incorporate a "base of operations" factor *Rhoditis* added to the inquiry two decades after *Lauritzen*.[303] In *Rhoditis*, the eighth factor enabled the Court to ignore the "façade" of a Greek-flagged ship that was nearly entirely owned by a Connecticut domiciliary who managed the corporation out of New York and operated mostly in America.[304] Similarly, in *Rainbow Line, Inc. v. M/V Tequila*, the Second Circuit found that American ownership "overshadowed" British registration and nominal British ownership.[305] There are British, French, and Canadian opinions to the same effect.[306] For example, a frustrated British court analogized corporate smoke-and-mirrors to pirates in remarking, "[p]irates carried the flag of every nation, but they were hanged by every nation notwithstanding."[307] In summary, although discounting the corporate structure is not a standard practice, courts do occasionally lift the corporate veil.

G. NATIONAL CONTROL

In limited circumstances, States have expanded maritime jurisdiction based on an actor's nationality. Recall that the tenuous nationality principle grants States jurisdiction over their citizens, regardless of where the harm occurs. UNCLOS adopted this principle with respect to

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302. *See supra* notes 233-43 and accompanying text.

303. Symeonides, *supra* note 171, at 240; Tetley, *supra* note 41, at 183.

304. *Rhoditis*, *supra* note 242, at 307, 310.

305. *Rainbow Line, Inc. v. M/V Tequila*, 480 F.2d 1024, 1027 (2d Cir. N.Y. 1973). The court noted, "it is well settled that courts will look through the façade of foreign registration and incorporation to the American ownership behind it" (citations omitted).

306. Tetley, *supra* note 41, at 180-83 (citing Chartered Mercantile Bank of India v. Netherlands, [1883] 10 Q.B.D. 521 (Eng. C.A.) (Eng.); Cour de cassation [Cass.] [supreme court for judicial matters], Feb. 12, 1991, 505 Le Droit Maritime Francais 315) (Fr.); Cass., July 4, 1989, 488 Le Droit Maritime Francais 639 (1984) (Fr.); Courd'Appeld'Aix-en-Provence, March 11, 1988, 484 Le Droit Maritime Francais 367 (1989) (Fr.);.Kuhr v. The "Friedrich Busse," [1982] 134 D.L.R. 3d 261 (Can.); Kosmopoulos v. Constitution Insurance, Co., [1987] 1 S.C.R. 2 (Can.)).

307. Tetley, *supra* note 41, at 181 (quoting Chartered Mercantile, *supra* note 306, at 535).

collisions and other navigational incidents: it permits concurrent jurisdiction of the flag State and the citizenship State of the master and other personnel.[308]

H. DOMESTIC SHIPPING PROTECTIONS

States have enacted numerous measures to address the national security concerns of a reduced merchant marine. These include incentives for domestic flagging and emergency control of foreign ships.

A number of government programs incentivize ship owners to flag in the United States. They are intended to promote a domestic maritime industry – shipbuilding infrastructure, shipbuilders, and seafarers – for mobilization in the event of war of national emergency.[309] For example, under the Jones Act, shipments between United States ports are restricted to vessels that were American-built and are owned and crewed by Americans.[310] To retain domestic shipping, Norway, Denmark, France, Spain, Portugal, Belgium, Germany, and the U.K. have experimented with "second registries."[311] The lower taxes of these shadow registries are intended to attract ship owners.[312]

The United States has also adopted programs to assure emergency maritime transportation access. One such initiative, the U.S. Maritime Security Program, subsidizes sixty United States-flagged vessels that agree to be available for official transport upon the Secretary of Defense's request.[313] Also, the U.S. Merchant Marine Act of 1936 grants the United States "effective control" of ships that are majority United States-owned but registered in Panama, Liberia, the Bahamas, Honduras, and the Marshall Islands.[314] The flag States apparently tolerate this sovereignty encroachment as an insurance payment against forceful United States interference with the FOC regime.[315] The size and

308. UNCLOS, *supra* note 17, at Art. 97.
309. *See, e.g.*, CONG. RESEARCH SERV., RS21566, THE JONES ACT (updated 2003).
310. 46 U.S.C. 30104. Canada has similar requirements for domestic shipping. *See* Brooks & Hodgson *supra* 265, at 151-52.
311. Wiswall, *supra* note 92, at 111-13.
312. *Id*.
313. U.S. Department of Transportation Maritime Administration, *Maritime Security Program*, http://www.marad.dot.gov/ships_shipping_landing_page/national_security/maritime_security_program/maritime_security_program.htm (last visited March 18, 2013).
314. DESOMBRE, *supra* note 81, at 214-15.
315. DESOMBRE, *supra* note 81, at 215.

effectiveness of this fleet is potentially quite limited,[316] and this arrangement remains untested.[317]

I. ACT IN CONTRAVENTION OF INTERNATIONAL LAW

Finally, sovereign States may act in contravention of international law. Well-established U.S. precedent recognizes that Congress's constitutional powers sometimes exceed international law constraints.[318] However, this reach is rarely exercised[319] and is likely to excite international opinion.

IX. CONCLUSION

Historical principles remain the cornerstone of the maritime legal regime. As this paper described, the original principles set the scene for the rise of FOC States, which often enjoy exclusive civil, criminal, and regulatory jurisdiction. This paper explored—theoretically and empirically—how the divergent motives of FOC States and the international community may disrupt the tenuous stability of the maritime commons. The rapid expansion of global commerce, migration, and communication ensure that this jurisdictional quandary will continue to increase in importance. There is a pressing need to re-envision the maritime legal regime. It is this author's hope that policymakers become inspired to develop options based on the alternative jurisdictional bases discussed in this paper.

316. *See* Henry S. Marcus, et al., "Increasing the Size of the Effective United States Control Fleet," MASSACHUSETTS INSTITUTE OF TECHNOLOGY (August 2002), http://www.dtic.mil/dtic/tr/fulltext/u2/a408239.pdf.

317. DESOMBRE, *supra* note 81, at 214-15; Mr. Heindel comments before the Special Oversight Panel on the Merchant Marine, "Vessel Operations Under Flags of Convenience and Their Implications on National Security," 107th Congress, June 13, 2002. *See also*, Anderson, *supra* note 57, at 144 (discussing the U.K.'s need to charter international ships during the First Gulf War).

318. *See supra* notes 212-234 and accompanying text.

319. *Id*.